

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a seventeen percent (17%) functional impairment rating to the body as a whole. The respondent and its insurance carrier requested this review and request the Appeals Board to reconsider the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent; and
- (2) The nature and extent of claimant's disability.

Those are the issues now before the Appeals Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified. Claimant is entitled to permanent partial general disability benefits based upon a twenty-one percent (21%) functional impairment rating to the body as a whole.

(1) In July, 1991 claimant first developed bilateral hand and wrist complaints while performing repetitive work for the respondent. Claimant was referred to the company's physicians and came under treatment of board-certified plastic surgeon Lynn D. Ketchum, M.D. In August, 1991 Dr. Ketchum ordered EMG studies which were normal. Based upon these normal EMG studies, Dr. Ketchum diagnosed bilateral tendinitis of both the extensor and flexor tendons. Because there was no surgical treatment to offer, Dr. Ketchum referred claimant to James S. Zarr, M.D., for physical rehabilitation. In December, 1991 Dr. Zarr ordered a second EMG which was also normal.

Claimant returned to work for respondent in June, 1992 restricted from repetitive gripping activities. Although the work was light, claimant was returned to a line position that required constant use of her hands. Claimant specifically recalls the period of July 13 through 16, 1992 when she was working on the Hi-Ho Cracker line three (3) out of those four (4) days. The remaining day she worked on the chocolate chip cookie line. During that four (4) day period, claimant experienced sharp pains in her wrists. Claimant testified she was required to constantly bend her wrists on the cracker line, and lift relatively heavy tins of cookies on the cookie line.

Because of her symptoms of pain, claimant sought additional medical treatment. In August, 1992 claimant returned to Dr. Ketchum who diagnosed bilateral carpal tunnel syndrome after obtaining positive EMG studies. Dr. Ketchum then performed carpal tunnel release surgery on the right hand in December, 1992 and on the left hand in January, 1993.

The Appeals Board finds claimant sustained personal injury by accident arising out of and in the course of her employment when she returned to work for the respondent in June and July 1992. Based upon the EMG studies, the Appeals Board finds claimant's bilateral tendinitis worsened and developed into bilateral carpal tunnel syndrome as a result of the repetitive cumulative trauma claimant experienced upon her return to work. This conclusion is also supported by the physician selected by the Administrative Law Judge to perform an independent medical examination, P. Brent Koprivica, M.D., who testified claimant sustained cumulative trauma upon her return to work that aggravated the pre-existing tendinitis, resulting in bilateral carpal tunnel syndrome. Because of the nature of the work claimant was performing from July 13 through 16, 1992, the Appeals Board finds claimant sustained injury during that period.

(2) Claimant has sustained a twenty-one percent (21%) functional impairment to the whole body for which she is entitled permanent partial general disability benefits. Because of *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 830 P.2d 41 (1992), bilateral upper extremity injuries are to be compensated as other nonscheduled injuries under the provisions of K.S.A. 1992 Supp. 44-510e. In pertinent part the statute reads:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

After recuperating from her surgeries, claimant returned to work for the respondent at a comparable wage. Shortly after her return, in March 1993, claimant obtained a job in the sanitation department that she could perform without significant problems. Because claimant now earns as much or more than she was earning when she developed the carpal tunnel syndrome, the presumption of no work disability found in K.S.A. 1992 Supp. 44-510e is applicable and claimant is limited to permanent partial general disability benefits based upon her functional impairment rating. Apparently claimant does not dispute this result as she did not introduce evidence of loss of ability to perform work in the open labor market or loss of ability to earn a comparable wage.

Dr. Ketchum testified he believes claimant has a twenty percent (20%) functional impairment to the left arm, but none to the right. He based the left arm functional impairment on loss of grip strength. Although claimant's grip strength on the right is probably "below normal," Dr. Ketchum does not believe the right arm is functionally impaired. Despite his opinion that claimant has no functional impairment to the right arm, he permanently restricted claimant from repetitively gripping with either hand.

Dr. Koprivica testified he believes claimant has a twenty percent (20%) functional impairment to the left hand at the wrist level and a twenty percent (20%) functional impairment to the right hand at the wrist level, which convert to a twenty-one percent (21%) functional impairment to the body as a whole. Like Dr. Ketchum, Dr. Koprivica also bases his opinions upon claimant's loss of grip strength. When Dr. Koprivica examined claimant on February 18, 1994, at the request of the Administrative Law Judge, he found claimant had grip strength curves in an appropriate bell-shaped distribution. Although someone of claimant's gender and age should have an average grip strength of 30.8 kilograms, claimant's highest right hand grip strength was only 18 kilograms, an approximate forty percent (40%) deficit in the dominant hand. Citing tables and pages, Dr. Koprivica explained how he arrived at his percentages of functional impairment.

The Appeals Board finds Dr. Koprivica's testimony to be persuasive and entitled to significant weight. Therefore, the Appeals Board finds claimant has sustained permanent injury and impairment to both upper extremities as a result of the bilateral carpal tunnel syndrome and that claimant has a twenty-one percent (21%) whole body functional impairment for which she is entitled to receive permanent partial general disability benefits.

(3) The Appeals Board adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with the specific findings made herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler should be modified as follows.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Sherry Moses, and against the respondent, Sunshine Biscuits, Inc., and its insurance carrier, Crum & Forster Insurance, Inc., for an accidental injury sustained on July 16, 1992, and based upon an average weekly wage of \$455.20, claimant is entitled to 15.43 weeks temporary total disability compensation at the rate of \$299.00 per week or \$4,613.57, followed by 399.57 weeks of permanent partial disability compensation at \$63.73 per week or \$25,464.60 for a 21% permanent partial general body disability making a total award of \$30,078.17.

As of November 29, 1995, there is due and owing claimant 15.43 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$4,613.57, followed by 160.43 weeks of permanent partial disability compensation at the rate of \$63.73 per week in the sum of \$10,224.20, for a total of \$14,837.77 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,240.40 is to be paid for 239.14 weeks at the rate of \$63.73 per week, until fully paid or further order of the Director.

Future medical treatment may be awarded upon proper application to the Director.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 is awarded to the claimant upon proof of payment.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Costs of transcripts in the record are taxed against respondent as a self-insured as follows:

Metropolitan Court Reporters, Inc.	\$216.20
Hostetler & Associates, Inc.	\$221.50
Gene Dolginoff & Associates, Ltd.	\$318.50

Pursuant to stipulation, the Kansas Workers Compensation Fund is ordered to pay 80% of the Award and costs.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David R. Hills, Lenexa, Kansas

Gary R. Terrill, Overland Park, Kansas  
J. Paul Maurin, III, Kansas City, Kansas  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director